

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY D. VALLEY)	
Claimant)	
VS.)	
)	Docket No. 165,115
PEERLESS PRODUCTS, INC.)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Modified Award entered by Administrative Law Judge Steven J. Howard on September 12, 1997. The Appeals Board heard oral argument on March 4, 1998.

APPEARANCES

Timothy A. Short of Pittsburg, Kansas, appeared for claimant. Gregory D. Worth of Lenexa, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board is listed in the Modified Award. The Appeals Board adopted the stipulations stated in the Modified Award.

ISSUES

The only issue for determination by the Appeals Board is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds that the Modified Award entered by the Administrative Law Judge should be modified to award permanent partial disability compensation based upon claimant's 15 percent impairment of function.

This case involves a claim for a February 25, 1992, injury to claimant's back. On May 25, 1994, Special Administrative Law Judge William F. Morrissey entered an Award for a 47 percent work disability. That Award was affirmed by the Appeals Board on September 2, 1994. This work disability award was based, in part, upon a finding that claimant had a 15 percent loss of ability to earn a wage comparable to the \$200 average weekly wage he was earning at the time of his injury. A post-injury ability to earn \$170 per week was based largely upon the claimant's work history and the testimony of vocational expert Karen Sherwood. Since then claimant has demonstrated an ability to earn in excess of \$200 per week.

On February 28, 1996, respondent filed its Application for Review and Modification of the award alleging claimant was no longer entitled to permanent partial disability compensation based upon a work disability because he had worked for wages comparable to his pre-injury average weekly wage since at least August 28, 1995. No evidence has been presented that claimant cannot continue to work and earn a comparable wage or that his job is merely temporary. Accordingly, the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e(a) should be applied. The effective date for any modification of the award should be August 28, 1995.

Upon review, the Administrative Law Judge modified permanent partial disability benefits to 38.5 percent work disability award by finding the claimant still has a 79 percent loss of ability to perform work in the open labor market but now has no loss of ability to earn comparable wages. The Appeals Board, likewise, takes into consideration the claimant's demonstrated post-accident wage-earning ability in the jobs he has held since the date of the original award to find no loss of wage-earning ability. But, based upon this factor and the record taken as a whole, the Appeals Board finds the presumption of no work disability applies. The presumption has not been overcome. Therefore, the claimant's loss of ability to access the open labor market cannot form the basis for the award upon review and modification. Instead, the claimant's 15 percent impairment of function is the basis for this award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated September 12, 1997, entered by Administrative Law Judge Steven J. Howard should be, and is hereby, modified as follows: The award entered on September 2, 1994, by the Appeals Board is modified to a 15% permanent partial disability beginning August 28, 1995.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary D. Valley, and against the respondent, Peerless Products, Inc., and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred on February 25, 1992. Based upon an average weekly wage of \$200 for 6.86 weeks of temporary total disability compensation at the rate of \$133.34 per week in the sum of \$914.71, followed by 175.71 weeks of permanent partial general disability compensation at the rate of \$62.67 per week or \$11,011.75, for a 47% permanent partial general disability. For the period commencing August 28, 1995, claimant is entitled to 232.43 weeks of permanent partial general disability compensation at the rate of \$20 per week or \$4,648.60 for a 15% functional disability, making a total award of \$16,575.06.

As of March 25, 1998, there is due and owing claimant 6.86 weeks of temporary total disability compensation at the rate of \$133.34 per week or \$914.71, followed by 175.71 weeks of permanent partial compensation at the rate of \$62.67 per week in the sum of \$11,011.75, followed by 134.43 weeks of permanent partial compensation at the rate of \$20 per week or \$2,688.60, for a total of \$14,615.06, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance in the amount of \$1,960.00 shall be paid at the rate of \$20 per week for 98 weeks.

All remaining orders entered by the Administrative Law Judge are adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, KS
Gregory D. Worth, Lenexa, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director